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IN THE
Supreme Court Of The United States
OCTOBER TERM, 1994

No. 94-1093

ROY ROMER, AS GOVERNOR OF THE STATE OF COLORADO, AND THE STATE OF COLORADO,
Petitioners,

vs.

RICHARD G. EVANS, *ET AL.*,
Respondents.

On Writ of Certiorari to
the Supreme Court of the State of Colorado

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND WOMEN'S LEGAL DEFENSE FUND AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Interest of Amici

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a public interest law firm founded in 1940, dedicated to combatting bias and securing equal opportunity for all Americans through public education, antidiscrimination legislation and full and effective enforcement of the civil rights laws. LDF has participated

as counsel of record or *amicus curiae* in important cases before this Court involving discrimination on a variety of levels, including race, *Brown v. Board of Education*, 347 U.S. 483 (1954), ethnicity, *St. Francis v. Al-Khazraji*, 481 U.S. 604 (1987), gender, *Phillips v. Martin Marietta Co.*, 400 U.S. 542 (1971), and age, *McKennon v. Nashville Banner Publishing Co.*, ___ U.S. ___, 115 S.Ct. 879 (1995), consistently urging the Court to recognize the real and destructive effects of prejudice. LDF has also participated in a number of cases, such as this one, regarding the scope of the Fourteenth Amendment's protection against subjugation, bias, and arbitrariness. *See e.g., Batson v. Kentucky*, 476 U.S. 79 (1986); *Cooper v. Aaron*, 358 U.S. 1 (1957); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Smith v. Allwright*, 321 U.S. 649 (1944).

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national nonprofit organization whose principal objective is to protect and promote the civil rights of Latinos in the United States. It is particularly dedicated to securing such rights in political access, immigration, education, employment, and language rights. MALDEF has litigated many cases in order to ensure equal access to the political process. Among those are *White v. Regester*, 412 U.S. 755 (1975) (invalidating the at-large election scheme for excluding Mexican Americans and African Americans from effective participation in the political process), *Garza v. County of Los Angeles*, 756 F.Supp. 1298, (C.D. Cal.), *aff'd*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (invalidating district boundaries as intentionally discriminatory against Latino voters and diluting Latino voting strength). As a civil rights organization, MALDEF has an interest in ensuring the protection of the most fundamental right to participate in the political process.

Founded in 1971, the Women's Legal Defense Fund (WLDF) is a national advocacy organization that works at

federal and state levels to promote policies that help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Recognizing that full gender equality cannot be achieved if discrimination on the basis of sexual orientation is permissible, WLDF has participated as *amicus curiae* in major lesbian and gay rights cases and has assumed an active role in efforts to make invidious discrimination on the basis of sexual orientation unlawful.

SUMMARY OF ARGUMENT

Petitioners' brief deals largely with the question of whether the *effect* of Amendment 2, without more, is sufficient to render that provision unconstitutional. The decision of the court below, however, did not rest exclusively on that impact. Rather, the Colorado courts also concluded as a matter of fact that Amendment 2 was framed and enacted for the *purpose* of thwarting equal participation in the political process by gay voters. This finding is fully supported by the record, and virtually compelled by the plain language of Amendment 2. That finding was not made over the objections of petitioners; to the contrary, here, as in *Carrington v. Rash*, 380 U.S. 89 (1965), petitioners insisted below that eviscerating the "factional" political influence of "special interest" gay voters constituted a legitimate reason, indeed a compelling state interest, justifying Amendment 2.

This avowed purpose of Amendment 2, we urge, is constitutionally impermissible. The lower courts' findings as to the purpose of Amendment 2 provide a case-specific basis for affirming the decision below, and render unnecessary a resolution of the broader issue of whether the effect of Amendment 2 would be sufficient itself to render that provision constitutionally infirm.

ARGUMENT

AMENDMENT 2 WAS ADOPTED FOR THE CONSTITUTIONALLY IMPERMISSIBLE PURPOSE OF PREVENTING GAY VOTERS FROM PARTICIPATING EQUALLY IN THE POLITICAL PROCESS

A. The Colorado State Courts Found that Amendment 2 Was Adopted for the Purpose of Preventing Gay Voters from Participating Equally in the Political Process.

In its 1993 decision, the Colorado Supreme Court emphasized that the impact of Amendment 2 on gay voters was deliberate:

> Amendment 2 alters the political process so that a *targeted* class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination ...Amendment 2 *singles out* that class of persons (namely, gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation.

(Pet. App. D-25) (emphasis added).

In 1994 the Colorado Supreme Court reiterated this finding:

> *Evans I*...was based on the fact that Amendment 2 *sought* to deny an independently identifiable group's right to participate equally in the political profess....In addition to denying the right of equal participation in the political process to a group based on sexual orientation, Amendment 2 also is *intended* to deny the same right to persons based on "homosexual, lesbian, or bisexual... conduct, practices, or relationships...." Amendment 2 *targets* this class of person....(Pet. App. B-22) (emphasis added)[1].

The trial court noted that the petitioners had openly defended Amendment 2 as a measure intended to thwart what they regarded as the pernicious influence of gay voters. Petitioners called as witnesses the leaders of Colorado for Family Values, which had drafted and led the campaign for Amendment 2. Those sponsors insisted that they had acted on the belief that "militant gay aggression in this state...endangers the state's political functions." (Pet. App. C-8).

> Petitioners' witnesses urged that this Amendment protected Colorado's political functions from being overrun by such groups....[T]he founder of CFV...testified that Amendment 2 was a defensive measure to fend off state-wide militant gay aggression. The court's notes contain his term "militant gay aggression" no less than six times in his direct testimony alone.

(Pet. App. C-6 to C-7).

Petitioners contended in the courts below that gay voters exercised undue influence in the political process. In

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[1] *See also* Pet. App. B-4 ("an attempt to impede the expression of 'a difference of opinion on a controversial political question'"). The dissenting judge below agreed, describing the purpose of Amendment 2 as "prohibiting homosexuals, lesbians and bisexuals from enacting certain legislation." (Pet. App. B-45).

the trial court, petitioners' counsel argued:

> [H]omosexuals...have political power *disproportionately* greater than their numbers....Homosexuals enjoy superior lobbying, clout [and] voting turnout.[2]

In the Colorado Supreme Court, petitioners insisted that the sponsors of Amendment 2 were gravely and legitimately concerned that "the legislature was too vulnerable to the formidable homosexual lobbying power here in Colorado"[3] and that the "homosexual 'movement was going forward' and that local gains were 'just a piece of the puzzle' which would be used as 'leverage to approach state legislators....'"[4] Having adduced evidence intended to substantiate those concerns, petitioners argued below that gays are:

> a politically powerful and relatively privileged special interest....Homosexuals are *immensely powerful* in proportion to their numbers....They enjoy *inordinate* access to influential cultural institutions such as the media and entertainment industries....[H]omosexual advocates have succeeded in dominating the terms of the debate.[5]

Similar objections, of course, have been voiced in the past

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[2] Defendants' Trial Brief, Case Nos. 92 CV 7233, P. 45 and n.55 (emphasis added).

[3] Opening Brief for Defendants-Appellants, Case Nos. 94 SA 048 and 94 SA 128, p.4.

[4] *Id.* at 5.

[5] *Id.* at 30-31 and n.42 (emphasis added).

about the political and cultural influence of other groups of Americans. Petitioners also contended that in Aspen, Boulder and Denver--cities which had passed anti-discrimination ordinances, in Denver and Boulder following public referenda--"homosexuals and bisexuals are a dominant force and wield the greatest political power."[6]

Counsel for petitioners repeatedly pressed in the courts below justifications for Amendment 2 that were entirely consistent with, and indeed more elaborate than the finding of the state courts as to the purpose of the Amendment. Petitioners insisted that one of the objectives "sought" by Amendment 2 was to "preven[t] government from supporting the political objectives of a special interest group,"[7] i.e. gay voters. The Colorado Supreme Court correctly characterized this as an argument which, by branding gay voters as a somehow illegitimate "special interest," sought to justify rigging the political process to deny them an opportunity for effective political participation:

> [D]efendants offer no authority to support the rather remarkable proposition that government has a compelling interest in seeing that the state does not support the political objectives of a "special interest group." The state exists for the very purpose

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[6] *Id.* at 34; *see also* Tr. 1497 (closing argument for state urging that Amendment 2 will "prevent against stealth campaigns at the local [level] by activists who would like to see sexual orientation in the law").

[7] *Id.* at 42-43; see also Trial Brief for Defendants, Case No. 92 CV 7223, p. 68 ("Amendment 2 prevents government from subsidizing the political objectives of a special interest group."); Brief in Support of Defendants' Motion for Summary Judgment, Case No. 92 CV 7223, p. 17 ("Amendment 2 prevents government from subsidizing the political objectives of a special interest group.").

> of implementing the political objectives of the governed....The fact that some political objectives are promoted by "special interest groups" is utterly inconsequential. Indeed, virtually any law could be regarded as a benefit to a "special interest group."

(Pet. App. B-20). Similarly, petitioners argued below that "Amendment 2...seeks to ensure that the deeply divisive issue of homosexuality does not serve to fragment Colorado's body politic."[8] The state Supreme Court, though properly recognized that the method of avoiding factionalism sought by Amendment 2 was intentionally to strip gay voters of any practical ability to advance through the political process their interests regarding the issues which the state sought to brand as unduly controversial:

> [W]e fail to see how the state, which is charged with serving the will of the people, can have any legitimate interest in preventing one side of a controversial debate from pressing its case before governmental bodies simply because it would prefer to avoid political controversy or "factionalism."

(Pet. App. B-21).

B. The Findings of the Court Below Are Supported by Substantial Evidence.

Petitioners do not directly take issue with the findings of the lower courts as to the actual purpose of Amendment

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[8] Trial Brief for Defendants, Case No. 92 CV 7223, pp. 60-61; see also Brief in Support of Defendants' Motion for Judgment on the Pleadings, p. 8 ("Amendment 2...seeks to ensure that the deeply divisive issue of homosexuality's place in society does not serve to fragment Colorado's body politic.").

2. Any dispute regarding this fact-bound issue is clearly outside the scope of the Question Presented.

Even if review of that issue had been sought in this Court, there would be no reason to overturn the decision of the Colorado Supreme Court. The purposes animating Amendment 2 are, as petitioners themselves emphasized below, "a quintessentially factual question." (Tr. 96) In *Crawford v. Los Angeles Board of Education*, 458 U.S. 527 (1982), this Court deferred to the conclusions of the California Supreme Court as to the motive behind the state constitutional provision there at issue. 458 U.S. at 544 ("[I]n this case,...involving the circumstances of passage and the potential impact of a Proposition adopted at a statewide election, we see no reason to differ with the conclusions of the state appellate court."); *see also Reitman v. Mulkey*, 387 U.S. 369 (1967). Here, as in *Crawford* and *Reitman*, the state appellate court was

> "armed...with the knowledge of the facts and circumstances concerning the passage and potential impact" of the Proposition and "familiar with the milieu in which that provision would operate."

Crawford, 458 U.S. at 543, *quoting Reitman*, 387 U.S. at 378.

The findings of the Colorado Supreme Court in this regard are fully supported by the record. The plain language of Amendment 2 is more than sufficient by itself to support, if not require, that finding. As the court below correctly observed, Amendment 2, on its face, is expressly targeted at a "class of persons," which the provision delineates as those individuals whose "orientation, conduct, practices, or relationships" are "homosexual, lesbian, or bisexual." Amendment 2 does not seek to exclude from consideration by state and local government all issues and controversies regarding sexual orientation, but focuses

exclusively on the issue--discrimination *against* homosexuals--which gay voters are particularly likely to press. Far from compelling government neutrality on issues regarding sexual orientation, Amendment 2 leaves the state and localities free to respond with alacrity to the wishes of any voters who favor government-imposed discrimination against gays.

With regard to the city ordinances prohibiting discrimination based on "sexual orientation," Amendment 2 invalidates those local laws only insofar as they apply to "homosexual, lesbian, or bisexual orientation". Thus heterosexuals retain the protection of the Denver, Boulder and Aspen ordinances, and heterosexual voters are free to seek similar protections from the state legislature. In this respect, Amendment 2 is on its face more extreme, for example, than California's 1964 Proposition 14, which applied equally to minority and non-minority voters, and which precluded the state from discriminating against minorities as well as from protecting them.[9] And, unlike the provisions previously considered by this Court, which were narrowly directed at a particular type of activity,[10]

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[9] *See Reitman v. Mulkey*, 387 U.S. 369, 371 (quoting Proposition 14), 391 (dissenting opinion) ("neutral on its face"), 394 ("a neutral provision restoring ...the sphere of free choice"); *Crawford v. Los Angeles Board of Education*, 458 U.S. 527, 527 (1982) (upholding provision which addressed racial issue "in neutral fashion"); *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 494 (Powell J. dissenting) (1982) ("[T]he State has adopted a policy of racial neutrality in student assignments."), 495 (challenged provision is "neutral on its face, and racially neutral as public policy").

[10] *See. e.g., Crawford v. Los Angeles Board of Education*, 458 U.S. 527 (1982) (limitation on use of two specific remedies--busing and pupil school assignment--to redress violations of state, but not federal, constitution); *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (limiting authority of local school officials, but not state officials or state courts, to utilize busing to integrate schools), 488 (dissenting opinion emphasizing subjects not covered by challenged provision), 490 (same), 496 (same), 497 n.12 (same).

Amendment 2 is broadly framed to encompass the entire gamut of possible government action. Covering such unrelated subjects as employment, housing, public accommodations, and insurance, and applying with full force to discrimination involving no assertion of privacy or religious motivation, Amendment 2 is unintelligible as the solution to any common problem other than the "problem" perceived by the Amendment's proponents of undue gay political influence. The purpose of Amendment 2 is thus even more apparent on its face than the motive which Justice Harlan perceived behind the Akron charter provision in *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (concurring opinion).

Petitioners themselves proffered testimony from the proponents of Amendment 2 in order to establish the purpose of Amendment 2. Petitioners' star witness was Tony Marco, who had drafted Amendment 2 and founded its sponsoring organization, Colorado for Family Values. Counsel for petitioners argued in his opening statement:

> You will...hear from Tony Marco who did much thinking on this issue and was instrumental in drafting Amendment 2 and planning the strategy that led to its electoral success. You will hear from [Marco and other CFV officials] about why they did what they did.

Mr. Marco candidly proclaimed that Amendment 2 was framed to thwart effective use of the political process by gay voters:

> It was necessary because it was obvious that the aggression of gay militants through the

> legislature was not going to cease....[T]he legislature is very vulnerable to all kinds of lobbying...lobbying for which I discovered gay militants were very well equipped and were very well experienced. And so the only way to ensure that this kind of activity would stop would be through passage of a constitutional amendment.[11]

The virtue of Amendment 2, Marco explained, was that it would completely preclude gay voters from advancing through the political process what he perceived to be their common goals. "[We] f[ound] a way to stop this kind of aggression with one single act." (Tr. 837). Amendment 2 was intentionally framed as broadly as possible to prevent enactment of any measures which gay voters might support:

> The fundamental principle behind the drafting of the initiative language was quite simply to take those factors which we felt that gay militants had themselves said that they desired, plus all of the factors that are attendant on achievement of or awarding of

[11] Tr. 839; *id.* at 837 (Amendment 2 framed to thwart the "broad statewide agenda of the militant gay movement."); *see id.* at 846 ("statewide aggression on the part of gay militants"); *see also id.* at 852 ("[W]e felt that the legislature was too vulnerable to the formidable lobbying power of the gay militant contingent here in Colorado."), 859 ("[W]hat we are dealing with in my opinion is one of the most politically powerful organizations relative to the size of its numbers."), 868 ("statewide militant gay aggression"), 869 (There would be "irrational public policy, if gay militants had their way on the State of Colorado.").

> protected class status, and simply say no to those.[12]

Marco explained that it was necessary to prevent gay voters from seeking government protection and assistance because other voters seeking such government resources "simply could not compete with gay militants' ability to lobby, to influence legislation, to promulgate its views through print and through other media." (Tr. 866). As the Colorado courts correctly recognized, Amendment 2 solved this "problem" by intentionally excluding gay voters from participation in that political competition to influence government legislation and policy.

Documentary evidence demonstrated that prior to the passage of Amendment 2 Marco had circulated flyers with similar admonitions that "[r]ecently Colorado homosexual, lesbian and bisexual activists and their supporters have launched a multi-pronged legislative offensive."[13] Marco had asserted that the tactics of these "gay extremists" "shows a striking resemblance to, of all things, a Communist Party directive quoted in the 1956 Report of the House of Representatives Committee on Un-American Activities."[14] Another flyer widely circulated by CFV in support of

[12] Tr. 843; *see also id.* at 853 ("[B]y dealing with *all* of this in essence in one full [sic] swoop, we simply closed the lid on the entire issue.") (emphasis added).

[13] PX 11, p. 1; *see also* PX 12, p. 1 ("In recent years, extremist homosexual, lesbian and bisexual activists and their supporters have launched a multi-pronged legislative offensive on national, state and local government levels."); PX 21 ("The so-called 'gay rights movement' is gaining ground...here in Colorado."); PX 22, p.1 (tabloid circulated by CFV with "astonishing, fully-documented reports of the actual goals of homosexual extremists").

[14] PX 12, p. 46; *see also id.* at 46 (one gay rights group allegedly "a truly fascist organization" which subscribed to "consciously 'subversive modes, drawn largely from...*Mein Kampf*.'").

Amendment 2 argued that gays exercised dangerously excessive influence because they had the support of "the gay-sympathetic media." (PX 20, p.2). At trial petitioners made a major effort to prove this allegation. Witnesses called by petitioners warned that gays had "an inordinate influence on the media"[15] and "receive disproportionate and largely sympathetic attention from the print and electronic media",[16] an excessive influence which petitioners attributed to the existence of "open gays and lesbians in many newsrooms." (Tr. 1257). Petitioners also sought to establish the existence of undue gay influence in Hollywood. (Tr. 1250).

In addition, petitioners attempted at trial to buttress Marco's argument that gays exercised excessive power in three cities which had enacted gay rights ordinances--Denver, Boulder and Aspen. In two of these cities--Boulder[17] and Denver[18]--the ordinances had been approved by voters in public referenda. Thus, petitioners offered testimony attacking the political views of the voters themselves in those cities. The reason for Amendment 2, according to petitioners' expert witness, was that local majorities in those cities were "inflamed" (Tr. 1003), "completely reckless" (Tr. 1198), "felt very strongly and were concentrated" (Tr. 1001), and had "propensities to abuse." (Tr. 1224). The virtue of Amendment 2, he asserted, was

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[15] Tr. 1244; *see also id.* at 1245 ("access that would not be accorded to other groups"), 1247 ("pro gay bias" on television; networks "enormously biased.").

[16] DX CC, pp. 26-27; *see also* DX 44, p. 2 ("[H]omosexuals enjoy support from every major news organization, whose coverage long ago crossed the line into outright advocacy of homosexual causes.").

[17] PX 39 (ordinance approved by vote of 7916 to 7621).

[18] PX 29 (ordinance approved by vote of 55,173 to 45,771).

that it shifted control over gay rights in those three cities out of the hands of local voters who were "closely ideologically involved in the question of gay rights," and conferred it instead on a broader electorate with "different interests," whom he regarded as "the moderates . . . the centralists." (Tr. 1002).

That Colorado's highest officials actually sought at trial to prove that its political processes were imperiled by a conspiracy of gay extremists is quite extraordinary. The modest changes that have occurred in the law regarding sexual orientation, and the professional successes of some gay people, would convince none but the paranoid that Colorado or any other state is actually threatened by "militant gay aggression." This argument bears an unsettling resemblance to the canard voiced half a century ago that Jews, who in fact then faced widespread and open discrimination, were somehow covertly exercising control over the nation's policies. Not since the heyday of Jim Crow have state officials attacked as a threat to the "body politic" the enactment of minimal protections for an unpopular group. The trial court understandably rejected these outlandish claims. (Pet. App. C-8).

In this Court, petitioners, although not directly attacking the findings of the Colorado Supreme Court, assert that the actual purpose of Amendment 2 was to assure that sufficient funds were available to enforce existing prohibitions against discrimination on the bases of race, gender and religion.[19] This proffered explanation is utterly implausible. The trial court concluded, to the contrary, that

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[19] "Amendment 2 is an appropriate means by which the people sought to focus government's limited resources upon those circumstances most warranting attention." Pet. Br. 41. Although petitioners suggest that there might be other rational bases for Amendment 2, this is the only basis which petitioners assert was the *actual* purpose of that provision.

applying anti-discrimination laws to sexual orientation would have entailed little if any additional cost:

> The facts don't support defendants' position . . . . [A]ctual experiences show that the presence of a sexual orientation provision has not increased costs or impaired the enforcement of other civil rights statutes or ordinance . . . . [T]his court now finds defendants' offered evidence of lack of fiscal ability unpersuasive in all respects.[20]

Amendment 2 does not provide that any nominal savings must or even should be utilized to enforce other anti-discrimination provisions, does not require that the state or localities appropriate any funds at all for enforcing those provisions, and leaves Colorado and its subdivisions free to repeal completely any existing statutes or ordinances that prohibit discrimination on the basis of race, gender or religion. Petitioners acknowledged below that extension of state anti-discrimination laws to sexual orientation would require no more than a single additional employee at the Colorado Civil Rights Division.[21] It is quite unbelievable that the sponsors of Amendment 2 would have solicited

[20]Pet. App. C-9 - C-10. Petitioners conceded below that enforcement of the Denver ordinance, for example, had involved no significant cost to the city. Opening Brief, Case Nos. 94 SA 048 and 94 SA 128 (Colo. S. Ct.) p. 29 ("[T]he Denver experience reflected little fiscal impact.").

[21] In the court below, the only argument advanced by petitioners regarding the impact of a possible state ban on sexual orientation discrimination was that in Wisconsin, a state substantially larger than Colorado, "almost a full time position was required to handle the . . . new civil rights filings each year precipitated by the sexual orientation law." (Opening Brief, Case Nos. 94 SA 048 and 94 SA 128 (Colo. S. Ct.), p. 29.).

more than 50,000 petition signatures (PX 21), expended hundreds of thousands of dollars (Tr. 747-48, 1046), and waged a year long state wide campaign merely to prevent the addition of a single worker to a state payroll that already numbered more than 156,000.[22]

There is, moreover, no mention whatever of this purported purpose in the flyers prepared by the proponents of Amendment 2, hundreds of thousands of which were circulated prior to the referendum. Rather, in language similar to Marco's testimony, the flyers called for preemptive action "to STOP the 'gay' activists,"[23] warning darkly that gay voter--"militant[s]" and "extremists"--were pursuing "astonishing...goals"; "[w]hat they really want will shock and alarm you." (PX 22, p. 1). The description of those alleged goals included topics, such as "Target: Children" and "Objective: Destroy the Family." (PX 22, pp. 2, 4). Much of this literature was baldly framed to inculcate blind animus toward gay voters by portraying them as an evil clique unworthy to participate in any aspect of civilized society. CFV insisted at length that central goals of gays included legalizing, and engaging in, pedophilia,[24] desecrating churches, and assaulting members of the clergy. (PX 21). The flyers were replete with luridly explicit descriptions of

[22]*See* Bureau of the Census, *Public Employment in 1991* 11 (1992).

[23] PX 21 (capitalization in original).

[24] PX 22, p. 2 ("[P]edophilia (the sexual molestation of children) is actually an accepted part of the homosexual community....Don't let gay militants double-talk hide their true intentions. Sexual molestation of children is a large part of many homosexuals' lifestyle....Say no to sexual perversion with children--vote YES on Amendment 2!").

bizarre sexual practices.[25] One bold-faced headline warned: "Lesbians are now having babies conceived by homosexual semen". (PX 21).

C. The Purpose Found by the Courts below Is Constitutionally Impermissible.

In *Carrington v. Rash*, 380 U.S. 89 (1965), Texas refused when registering voters to recognize as bona fide residents any member of the armed forces who had not been a Texas resident when he or she entered the service. The state sought to justify this statute as a method of preventing military personnel from dominating local elections. The Court held that such a purpose was unconstitutional *per se*:

> [T]he State's first contention is that the...provision is necessary to prevent the danger of a "takeover" of the civilian community resulting from concentrated voting by large numbers of military personnel in bases placed near Texas towns and cities. A base commander, Texas suggests, who opposes local police administration or teaching policies in local schools, might influence his men to vote in conformity with his predilections. Local bond issues may fail, and property taxes stagnate at low levels because military personnel are unwilling to invest in the future of the area....But..."[f]encing out" from the franchise a sector of the population *because of* the way they may vote is constitutionally impermissible.

[25] PX 21; PX 22, p. 4; see also PX 20 (CFV letter referring to accompanying "Shocking brochure" with "graphic, disgusting facts" that will "shock and repel").

380 U.S. at 93-94 (emphasis added); *see also id.* at 94 (right to vote cannot be restricted "because of fear of the political views of a particular group").

This holding in *Carrington* has been reiterated by this Court on numerous occasions. In *Cipriano v. Houma*, 395 U.S. 701 (1969), the Court emphasized that it was "constitutionally impermissible" to preclude non-landowners from voting on the issuance of revenue bonds because their interests, and thus likely voting behavior, were different than those of property owners. 395 U.S. at 705-06. In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the state sought to justify a one-year residence requirement for voters as a method of assuring that new voters would share the interests of existing residents. This Court held:

> Tennessee's hopes for voters with a "common interest in all matters pertaining to [the community's] government is impermissible"...."[D]ifferences of opinion" may not be the basis for excluding any group or person from the franchise...."[T]he fact that newly arrived [Tennesseans] may have a more national outlook than longtime residents, or even may retain a viewpoint characteristic of the region from which they have come, is a constitutionally impermissible reason for depriving them of their chance to influence the electoral vote of their new home state."

405 U.S. at 355-56 (footnote omitted); *see also Evans v. Cornman*, 398 U.S. 419, 422-423 (1970).

This Court has also held that district lines that may not be drawn for the avowed purpose of minimizing the political influence of a targeted group. *Burns v. Richardson*, 384 U.S. 73 (1966), recognized that the Constitution would not permit use of a district plan "designed to...minimize or

cancel out the voting strength of racial or *political* elements of the voting population." *Id.* at 89 (emphasis added). In *Gaffney v. Cummings*, 412 U.S. 735 (1973), the Court reiterated that multimember districts would be unconstitutional if "invidiously discriminatory because they were employed to minimize or cancel out the voting strength of racial *or political elements* of the population." 412 U.S. at 751 (emphasis added), *quoting Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). In *Mobile v. Bolden*, 446 U.S. 55, 69, n.14 (1980), the Court stressed that the term "employed" in this passage in *Gaffney* referred to "the existence of discriminatory purpose." *Gaffney* also indicated that the boundaries of particular legislative districts could not be intentionally drawn "to minimize or eliminate the political strength of any group or party." 412 U.S. at 754. *Davis v. Mann*, 377 U.S. 678, 691 (1964), emphasized that a districting scheme adopted for the purpose of discriminating against "military and military-related personnel...is constitutionally impermissible."

Most recently in *Davis v. Bandemer*, 478 U.S. 109 (1988), six members of the Court agreed that plaintiffs in a gerrymandering case could prevail by demonstrating "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." 478 U.S. at 127, (plurality opinion), 161 (Powell, J., concurring in part and dissenting in part). The Court expressly rejected the contention that the constitutional prohibition against invidious gerrymandering should be limited to race claims. *Compare* 478 U.S. at 125-27 (plurality opinion) *with* 478 U.S. at 144-61 (dissenting opinion).

In the instant case, Colorado unquestionably would have violated the Constitution if, as in *Carrington*, the state had concocted some voter registration requirement that disproportionately screened out gays and did so with the intent "to deny [them the] right to participate equally in the

political process." (Pet. App. B-22). The state would have also acted unconstitutionally if it had mandated an invidious gerrymander of city council districts in Aspen, Denver or Boulder for the avowed purpose of "minimiz[ing] or cancel[ing] out the voting strength" of gay voters. *Gaffney*, 412 U.S. at 752. The result is no different here merely because, in seeking to accomplish a similar discriminatory result with an identical invidious purpose, Colorado has chosen instead a different method of manipulating its political process. The Fourteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

To be sure, the particular device at issue in this case is different from the practices in *Carrington* and *Davis v. Bandemer*. But the constitutional transgression in those cases concerned the purpose of the government action, not the specific manner in which the state had sought to further the constitutionally impermissible goal. The Colorado Supreme Court below concluded that the purpose of Amendment 2 was to eviscerate the political power of gay voters and organizations to bring about changes in state or local laws with which the proponents of Amendment 2 happened to disagree. Such a deliberate scheme

> to "withdraw all political influence from those who are practically hostile" to the existing order, strikes at the very heart of the democratic process. A temporal majority could use such a power to preserve inviolate its view of the social order simply by disenfranchising those with different views.

Richardson v. Ramirez, 418 U.S. 24, 83 (1976) (Marshall, J., dissenting).

Nothing in *James v. Valtierra*, 402 U.S. 137 (1971), is to the contrary. There was no claim in that case that the

California constitutional provision there at issue had been adopted for the purpose of preventing equal political participation by the poor. On the contrary, both the District Court opinion and the dissenters in this Court relied exclusively on the effect of that provision[26]. The majority stressed that under the circumstances in that case the California provision mandating referenda to review the creation of certain housing projects "demonstrate[d] devotion to democracy, not bias, discrimination, or prejudice." 402 U.S. at 141. Unlike Amendment 2, which was deliberately framed to obstruct in the most sweeping manner every conceivable anti-discrimination action, the California provision did not apply to any of the myriad of non-housing actions local officials might take to benefit the indigent, such as providing Head Start programs, school lunches, remedial education under Title I, etc. Even with regard to housing for the poor, no referendum was required if local officials chose to provide subsidies for indigent tenants in private housing, to use zoning laws to require developers to include units for low income tenants, or to forbid landlords from discriminating against tenants receiving welfare. Nor did the California measure require indigent voters to meet the often onerous burdens necessary to initiate a referendum. In sum, the provision in *James* was directed at a quite specific type of housing project, not at interfering generally with effective political participation by indigent voters.

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[26] 402 U.S. at 145 (Marshall, J., dissenting) ("substantial burden...on the poor); *Valtierra v. James*, 313 F. Supp. 1, 6 (N.D. Cal. 1970) ("[L]ack of bad motive has never been held to cure an otherwise discriminatory scheme. Certainly *Hunter* does not demand a demonstration of improper motivation.").

D. Amendment 2 Has the Effect of Denying Gay Voters an Equal Opportunity to Participate Effectively in the Political Process.

A state law or constitutional provision is not necessarily invalid solely because it was motivated by a desire to reduce the political impact of a group of voters. For example, a districting plan framed to eliminate a disproportionate advantage previously enjoyed by one political party, and which merely resulted in representation that is "a rough approximation of the statewide political strengths of the Democratic and Republican parties," would pose no constitutional problem. *Gaffney*, 412 U.S. at 752. Similarly, limits on campaign contributions, even though directed at least in part at curbing disproportionate influence or access by rich contributors, serve at most to equalize the ability of contributors to advance favored candidates. *Buckley v Valeo*, 424 U.S. 1, 25-26 (1976). In order to violate Equal Protection, a scheme not only must be animated by an intent to reduce the influence of an identifiable group of voters, but also must have the effect of "consistently degrad[ing] a voter's or a group of voters' influence on the political process...." *Davis v Bandemer*, 478 U.S. at 109.

Amendment 2 is not a mere "gauntlet" or "hurdle;" rather, Amendment 2 is a virtually insuperable barrier to the adoption of any governmental measures protecting gays from discrimination. In the court below petitioners correctly characterized Amendment 2 as such a flat prohibition:

> [T]he plain language of Amendment 2 itself...remove[s] state and local government from the issue [of gay rights]

> altogether....Amendment 2 was about the *resolution* of the debate...a final decision is made on this divisive issue.[27]

Other lower court briefs submitted by petitioner were equally emphatic in describing Amendment 2 as an absolute and definitive bar.[28]

In this Court, however, petitioners seek to recharacterize Amendment 2 as merely altering the process for enacting gay rights legislation. Petitioners do not rely in this regard on the actual language of Amendment 2, which is on its face a flat prohibition, but instead tacitly invoke Article V, section 1 of the Colorado Constitution, which permits future amendments. Thus, petitioners reason, Amendment 2 has not prohibited laws or ordinances against sexual orientation discrimination, but merely established a new process under which, as part of adopting any such enactments, the constitution of Colorado would first have to be amended by statewide referendum. But the hypothetical possibility of subsequent constitutional amendments does not convert an unequivocal constitutional prohibition into a mere process for taking the forbidden action. In petitioners' view the Establishment Clause of the First Amendment would constitute, not a barrier to the creation of a national

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[27] Opening Brief, Case Nos. 94 SA 048 and 94 SA 128 (Colo. S. Ct.), pp. 39, n.57, 45 (emphasis in original).

[28] Opening Brief, Case No. 93 SA 017 (Colo. S. Ct.), pp. 5 ("Amendment 2...barred special civil rights protections"), 12 ("Amendment 2...prohibits" adoption of certain anti-discrimination rules); Reply Brief, Case No. 93 SA 017 (Colo. S. Ct.), p. 7 ("Amendment 2 prohibits adopting of specific civil rights protections); Brief in Support of Defendant's Motion to Dismiss, Case No. 92 CV 7223 (D. Ct. Denver), pp. 2 ("prohibits"), 5 ("prohibition"), 25 (Amendment 2 places civil rights protections for homosexuals "beyond the competency of government officials.").

church, but merely a decision to let Congress, in consultation with three-quarters of state legislatures, determine which particular religious sect all Americans should be compelled to join. In adopting Amendment 2, Colorado has erected against adoption of anti-discrimination measures a barrier as insurmountable as is possible to create in a democracy. Three decades ago in *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713 (1964), this Court rejected this same argument that a provision of the Colorado constitution diluting the votes of certain voters could be upheld merely because Colorado voters retained the right to amend their state's constitution. 377 U.S. at 732, 733, 737.

Even if the possibility of further amending the Colorado constitution is considered, the burden imposed by Amendment 2 is too severe. In the wake of Amendment 2, proponents of any protections against sexual orientation discrimination bear the burden of obtaining the more than 54,000 signatures necessary to even obtain a public vote.[29] If, for example, such a measure were sought by the people of Aspen, the number of signatures needed would be 130 times the total number of voters in the town.[30] Under Amendment 2, the overwhelming majority of the voters could be hundreds of miles from, for example, the town of Aspen, and understandably unfamiliar with, if not indifferent to, local problems. The critical reason for placing a barrier to gay rights legislation in the Colorado Constitution, petitioners themselves emphasized below, was to create an

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[29] Article V, section 1(2) of the Colorado Constitution requires petition signatures equal to five percent of the votes cast in the most recent election for secretary of state.

[30] There are 4031 registered voters in the town of Aspen.

obstacle that could "not be easily displaced or circumvented."[31]

As petitioners frankly acknowledge, Amendment 2 was framed and enacted for the avowed purpose of overturning, and preventing further adoption of, measures that prohibited discrimination by state and local government officials in Colorado. (Pet. Br. 6). There were at least ten such measures directed exclusively at preventing governmental discrimination: (a) an executive order issued by the governor prohibiting employment discrimination on the basis of sexual orientation by any state agency,[32] (b) prohibitions issued by officials of, and applicable to employment by, Boulder County (PX 118), the Denver Police (PX 32), the Denver Public Library (PX 31), and the City and County of Denver (PX 10), against sexual orientation discrimination in government employment, (c) a prohibition generally forbidding discrimination on the basis of sexual orientation by Denver officials with regard to government housing, contracting services, and credit (PX 36), (d) general prohibitions adopted by at least two state colleges against sexual orientation discrimination in employment or education (Pet. App. D-25), and (e) directives issued by the Denver Police Department forbidding police officers from engaging in harassment, or making derogatory remarks in radio transmissions, with regard to sexual orientation. (PX 33, PX 34). In addition, the local ordinances forbidding discrimination on the basis

[31] Opening Brief, Case Nos. 94 SA 048 and 94 SA 128, (Colo. S. Ct.), p. 52.

[32] PX 46. That prohibition is reflected in Colorado civil service regulations. PX 47.

of sexual orientation often applied to governmental as well as private entities.[33]

Amendment 2 invalidates these and any future prohibitions against discrimination by employees of Colorado or its political subdivisions. Amendment 2 was openly advocated as a method of preventing elected officials from interfering with discrimination by their subordinates.[34] The provision does so by directing in part that neither the state, its agencies, nor its subdivisions

> shall...adopt or enforce any...policy whereby homosexual...orientation...shall constitute...the basis of...any claim of...discrimination.

Measures such as the governor's executive order forbidding employment discrimination by his or her subordinates is just such a "policy" clearly forbidden by the language of the Amendment.

Amendment 2, in an unprecedented and quite bizarre manner, obstructs the normal operation of the political process and of state and local government. The purpose and effect of the Amendment is to strip elected officials, and any other supervisory officials down through the chain of command, of any power to interfere with decisions by their subordinates to engage in discrimination. The governor may opt to make his own decisions in a non-discriminatory manner, but he cannot direct "[t]he head of each principal department" to do the same. (Compare PX 44). The Denver Chief of Police may avoid harassing anyone on the basis of

[33] PX 37 (Boulder ordinance applies without limitation to all employers); PX 48 (Aspen ordinance applies to "any...government agency").

[34] PX 22, p. 7 (urging vote for Amendment 2 in order to protect "[g]overnment workers" who object to "hir[ing] gays" and "promot[ing] homosexuals").

sexual orientation, but he cannot order "all Police Department personnel" to refrain from such actions. (Compare PX 33). The mayor of Denver may chose not to personally discriminate in decisions regarding government housing, services, contracting, etc., but he cannot require "all department heads" to follow a similar course. (Compare PX 36).

Amendment 2 places each of the hundreds of thousands of state and local government employees in Colorado, insofar as they may wish to discriminate against gays, outside the powers of any elected official and thus beyond the reach of the political process. Petitioners argue that a presumption of propriety should be accorded to choices made by government officials "who are accountable to" "those put in authority by the electoral process" (Pet. Br. 32 n. 22); but a core purpose of Amendment 2 is to guarantee that state and local government employees in Colorado will *not* be so accountable. Discrimination against homosexuals in the exercise of governmental power is in Colorado the constitutional right of every individual police officer, school teacher, office supervisor, public housing official, and college admissions clerk. Far from bringing about uniformity, this near anarchical scheme means that whether a gay applicant can obtain a government job, or be admitted to a state college, turns solely on the whims and biases of whichever official happens to be charged with making that particular decision.

On repeated occasions this Court has emphasized that individuals aggrieved by injury at the hands of government officials must--in the absence of a clear constitutional transgression--look to the political process for redress. For gay victims of discrimination in Colorado today, that is simply impossible. Gay applicants denied state jobs on the basis of sexual orientation cannot obtain redress from even a willing governor, and, if dissatisfied with a hostile governor's lack of response, cannot improve their situation by voting into office a new governor sympathetic to their plight. It is a mockery of democracy to assert of this

situation, as do petitioners (Pet. Br. 11, 26, 27), that gays remain free to run for office or to vote for the candidates of their choice. For gay voters aggrieved by sexual orientation discrimination on the part of state or local government employees, the political process has been deliberately rendered an empty charade.

CONCLUSION

For the above reasons the judgment of the Colorado Supreme Court should be affirmed.

Respectfully submitted,

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